IN THE MISSOURI SUPREME COURT

No. SC92539

ANITA JOHNSON,
Respondent,

v.

JF ENTERPRISES, LLC, d/b/a JEREMY FRANKLIN'S SUZUKI OF KANSAS CITY, and JEREMY FRANKLIN,
Appellants,

and

AMERICAN SUZUKI MOTOR CORPORATION,
Defendant.

Appeal from the
Circuit Court of Jackson County, Missouri
Division 11
The Honorable W. Brent Powell, Circuit Judge

SUBSTITUTE REPLY BRIEF OF APPELLANTS JF ENTERPRISES AND JEREMY FRANKLIN

Kevin D. Case, No. 41491
Patric S. Linden, No. 49551
Case & Roberts P.C.
Two Pershing Square
2300 Main Street, Suite 900
Kansas City, MO 64108
Tel: (816) 448-3707
Fax: (816) 448-3779
kevin.case@caseroberts.com
patric.linden@caseroberts.com
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION, BECAUSE RESPONDENT FAILED TO MAKE A SUFFICIENT SHOWING THAT THE DOCTRINE OF *KRUEGER V. HEARTLAND CHEVROLET* WAS APPLICABLE TO THE PARTIES' ARBITRATION AGREEMENT, IN THAT WHILE THE RETAIL INSTALLMENT CONTRACT CONTAINED A MERGER CLAUSE, RESPONDENT FAILED TO DEMONSTRATE THAT THE ARBITRATION AGREEMENT WAS SUBJECT TO THE MERGER CLAUSE BECAUSE SHE PRESENTED NO EVIDENCE THAT THE ARBITRATION AGREEMENT WAS EXECUTED PRIOR TO THE RETAIL INSTALLMENT CONTRACT.

Johnson appears to contend that the sequence in which documents are executed in a motor vehicle sale transaction is immaterial. So long as there is a contract document that contains a merger clause and which covers the terms of the sale, she argues that the merger clause will preclude modification of the agreement, regardless of whether the parties subsequently enter into a subsequent written agreement whose provisions would modify the previously-executed contract. This is, in essence, the position taken by the Court of Appeals in its opinion, below. However, that position is at odds with long-standing contract law, which clearly empowers the parties to a contract to modify its

terms, especially when the contract sets forth the specific manner in which the contract terms can be amended.

The holding of *Krueger v. Heartland Chevrolet* rests upon an implicit finding that the retail installment contract was the final contract document executed by the parties in Ms. Krueger's transaction, a factor which is not present, here. Because the retail installment contract in *Krueger* was the final contract, its merger clause operated to supersede all *prior* writings. Thus, the retail installment contract in that case was the final expression of the parties' intent. However, the analysis in the *Krueger* opinion leads to a different conclusion in situations where the retail installment contract is not the final contract document executed by the parties, such as the case at bar.

The merger clause in the parties' Retail Installment Contract expressly allows amendment of that contract and specifies how such amendments may be adopted. Specifically, the merger clause states, in relevant part, that the contract "**is the complete and exclusive statement of the agreement between us*, except as we may later agree in writing to modify it.***" Legal File at LF 61 (emphasis in original, italics added). Thus, the parties can, by a subsequent written agreement, amend the Retail Installment Contract. That is precisely what occurred, here, via the parties' subsequent execution of the Arbitration Agreement after the Retail Installment Contract.

Johnson contends that there is no factual support in the record to support a conclusion that the parties' Arbitration Agreement was executed after the Retail Installment Agreement. However, this disregards her own evidence that she presented to the trial court. Johnson correctly describes the Retail Installment Contract as the document through which she agreed to purchase the vehicle. Johnson, however, then disregards her own affidavit presented in the proceedings below, which stated that the Arbitration Agreement was presented to her after she agreed to purchase the vehicle. Legal File at LF 89. Thus, her own affidavit demonstrates that the Arbitration Agreement was executed later in the transaction than the documents through which she agreed to purchase the vehicle. Put another way, her own affidavit shows that the Arbitration Agreement was presented and signed by her after she executed the Retail Installment contract.

Johnson also questions the necessity of entering into an contract amendment so soon after executing the underlying contract. Naturally, it would be preferable to avoid such circumstances, but it is not always possible to do so. The Courts have recognized that form contracts are both ubiquitous and necessary in modern consumer transactions. *See Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 310 (Mo. Ct. App. 2005). Where form contracts are used, circumstances arise where the form may become unsuitable, especially when there are changes in the law or in business practices. It can take time to obtain replacement forms, and in the interim, the best route is to use the original form, together with a subsequent writing amending the terms of the form contract

as necessary. The use of separate arbitration agreements, as here, has likely been the result of the rapidly shifting status of the law with regard to arbitration agreements and the enforceability of particular provisions.[1]

Johnson's argument that the Arbitration Agreement does not reference the Retail Installment Contract also cannot be squared with the record. While the Arbitration Agreement, here, does not expressly state that it is integrated into the parties' prior agreements, its terms reference the "financing contract" multiple times. Legal File at LF 62. In light of the facts in the record demonstrating that the Arbitration Agreement was executed *after* the documents by which Plaintiff agreed to purchase the vehicle, the trial court erred in its reasoning that the Arbitration Agreement was superseded by the Retail Installment Contract. Instead, the facts in the record demonstrate that the Arbitration Agreement operates as a written modification of the parties' Retail Installment Contract,

[1] For example, in the seven years since *Whitney v. Alltel* was decided in 2005, at least twenty-one appellate decisions have been issued which discussed whether particular arbitration agreements were enforceable or unconscionable. Certainly, the history of the *Brewer v. Missouri Title Loans* matter demonstrates that the legal landscape with regard to the Court's interpretation of arbitration agreements and the enforceability of particular provisions has been an area of considerable change and variability over the past few years.

and amends that contract in the precise manner that the Retail Installment Contract contemplates and authorizes.

Accordingly, this Court should reverse the trial court's ruling denying Appellants' Motion to Compel Arbitration, and remand this case with instructions to enter an order compelling Johnson to submit her claims to binding arbitration.

II. THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION, BECAUSE THAT DENIAL CANNOT BE UPHELD UPON ANY OF THE ALTERNATIVE GROUNDS RAISED IN RESPONDENT'S SUGGESTIONS IN OPPOSITION TO THE MOTION TO COMPEL ARBITRATION, IN THAT THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE, DOES NOT LIMIT HER ABILITY TO BRING CLAIMS OR SEEK RECOVERY UNDER THE MISSOURI MERCHANDISING PRACTICES ACT, AND RESPONDENT'S CLAIMS FALL WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

A. The Parties' Arbitration Agreement Is Not Unconscionable.

Johnson appears to concede that the enforceability of the Arbitration Agreement, here, is governed by the Federal Arbitration Act.

1. The Arbitration Agreement Cannot Be Invalidated On The Basis Of Procedural Unconscionability

Johnson first argues that the Arbitration Agreement should be found procedurally unconscionable because she had no opportunity to negotiate the terms of that agreement and because she was in an unequal bargaining position. This is nothing more than an assertion that the Arbitration Agreement should be invalidated because it is part of a contract of adhesion. However, even if the Arbitration Agreement is adhesive (which

JFE denies), this does not yield a basis for refusing to enforce that agreement. "The simple inclusion of a general agreement to arbitrate in a contract of adhesion may not, in and of itself, warrant voiding the arbitration provision under the FAA." *Manfredi v. Blue Cross & Blue Shield of Kansas City*, 340 S.W.3d 126, 133 (Mo. App. banc 2011).

On appeal, Johnson appears to have abandoned the arguments made to the trial court that the Arbitration Agreement was "the back portion" of some other document and that she did not see it. *Compare* Respondent's Brief at 14-15; Legal File at LF 91-92. Rather, her argument now is that Arbitration Agreement was not pointed out to her, because she was given the documents in a "stack" to sign and that the "Arbitration Agreement was buried in a pile of papers." However, she fails to provide citations to the Record on Appeal in support of any of those factual assertions. Moreover, her assertion that she never saw the Arbitration Agreement is flatly contradicted by her signature upon the agreement itself. Legal File at LF 62. She has raised no argument either before the trial court or on appeal that the Arbitration Agreement was not signed by her. Her arguments are also inconsistent Johnson's affidavit which acknowledges that she had, in fact, read (albeit not "thoroughly") the documents that were presented to her. *See* Legal File at LF 104. In light of Johnson's inconsistent arguments on this issue, the trial court should have hewn to the well-settled rule that a party to a contract is charged with knowledge of its terms, even if the party has not read the contract. *Grossman v. Thoroughbred Ford, Inc.*, 297 S.W.3d 918, 922 (Mo. Ct. App. 2009) ("Missouri law presumes that a party had knowledge of the contract he or she signed; and those who sign

a contract have a duty to read it and may not avoid the consequences of the agreement on the basis that they did not know what they were signing.")

However, even if the Arbitration Agreement is considered adhesive in nature, it is nevertheless enforceable. Johnson was presented with a document titled "Arbitration Agreement," in a large, bold font. Legal File at LF 62. The next, bold-face statement on that document, states, "**PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS**." *Id.* This statement is followed by three numbered paragraphs, also in an all-uppercase font, summarizing the key provisions of the arbitration agreement, including, "1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL." *Id.* Given these conspicuous statements at the forefront of the Arbitration Agreement, it would be absurd to conclude that Johnson had no notice that she was agreeing to submit disputes against JFE to arbitration. *Compare, Cicle v. Chase Bank USA*, 583 F.3d 549, 554-55 (8th Cir. 2009) (discussing adequacy notice of arbitration provision in cardholder agreement based upon boldface headings and use of all-uppercase fonts). Thus, the requirement that Johnson must arbitrate her claims in this matter can hardly be considered to be a "surprise" or "unexpected" term of the parties' contract. Indeed, even in the case of contracts of adhesion, "an ordinary person could reasonably expect general arbitration provisions." *Manfredi*, 340 S.W.3d at 135.

2. The Arbitration Agreement Cannot Be Invalidated On The Basis Of Substantive Unconscionability.

Johnson next contends that the Arbitration Agreement is substantively unconscionable because it purportedly requires her to give up certain rights. On page 15 of her Brief, she provides a quotation containing a bulleted list of those rights she claims that the Arbitration Agreement waives. She provides no citation to the record to support that listing, however. *Nor does the quoted language actually appear anywhere in the Arbitration Agreement. See* Legal File at LF 62. Thus, Johnson's argument is that the Arbitration Agreement should be invalidated on the basis of a quoted list that appears nowhere within that Agreement. Obviously, it would be absurd to hold that an Arbitration Agreement is unenforceable because of the unconscionability of language that does not actually appear within that Agreement.

While the Arbitration Agreement does advise the parties that they are relinquishing the right to jury trial and advises that discovery and appellate review "are generally more limited than in a lawsuit," this is part and parcel of the arbitration process itself. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775, 176 L. Ed. 2d 605 (2010). Johnson's argument is nothing more than a veiled assertion that arbitration, itself, is unconscionable, rather than an attack on the specific terms of the

parties Arbitration Agreement. She made no demonstration (despite bearing the burden to make that showing) that she would be unable to obtain an adequate remedy through arbitration.

The U.S. Supreme Court's recent decision in *AT&T Mobility v. Concepcion* makes clear that state courts cannot hold arbitration agreements unenforceable merely because jury trials are unavailable or because discovery or appellate rights are less broad than in conventional court litigation:

> An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. […]

> Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed "a panel of twelve lay arbitrators" to help avoid preemption). Such examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in "a great variety" of "devices and formulas" declaring arbitration against public policy.

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747, 179 L. Ed. 2d 742 (2011) (citations omitted). The *AT&T Mobility* Court held that such attempts to burden arbitration with procedural requirements mirroring court litigation are improper and are preempted by Section 2 of the Federal Arbitration Act because they demand procedures that are fundamentally incompatible with arbitration. *See id.* Johnson's argument, therefore, that the Arbitration Agreement must be held to be substantively unconscionable because it deprives her of the right to jury trial or the same broad discovery or appellate procedures that would be available to her in court must be rejected. Holding otherwise would impose requirements on Arbitration Agreements incompatible with arbitration, which is expressly forbidden under the FAA, as recognized by the *AT&T Mobility* decision.

Next, turning to Johnson's argument that the Arbitration Agreement is substantively unconscionable because it contains a class action waiver, this argument is also directly addressed by the *AT&T Mobility* decision. The *AT&T Mobility* Court which expressly held that state courts cannot find that an arbitration agreement is unconscionable and unenforceable merely because it contains a class action waiver. *See AT&T Mobility*, 131 S.Ct. at 1753. Moreover, this argument is a red herring, given that Johnson's Petition pleads no class claims and she has not made any demonstration of any intent to raise class claims against JFE. Legal File at LF 6-20. The question of whether or not the class action waiver is enforceable or not is, therefore, immaterial to the claims she raises, here. Nor does she advance any argument that the class waiver would somehow prevent her from obtaining full relief upon the claims she has raised on her own behalf in this matter.

This Court most recently addressed whether the unavailablility of class arbitration renders an arbitration agreement unconscionable in *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. banc 2012) *cert. denied*, 11-1466, 2012 WL 2028610 (U.S. Oct. 1, 2012). In *Brewer*, the plaintiff filed a class action petition against a title loan company bringing claims which arose out of a title loan. *See id.* at 487. The principal balance of the loan was $2,215, with an 300% annual interest rate. *See id.* The title lender sought to compel arbitration of the plaintiff's claim and enforcement of the provision requiring the plaintiff's claim to be submitted individually to arbitration, and not as a class action. *See id.* at 488. The trial court refused to enforce the class action waiver, based upon

additional findings of fact made by the court with regard to the unconscionability of that agreement. *See id.* Specifically, the trial court found that the class action waiver, together with the one-sided nature of the agreement, the disparity of bargaining power, and the requirement that each party be responsible for its own costs in arbitration "rendered the agreement unconscionable when considered as an individual action." *Id.*

In *Brewer*, the trial court made fact determinations bearing upon the issue of the unconscionability of the class action waiver. *See id.* at 488, 494. There were no such findings made by the trial court in the case at bar. *See* Legal File at LF 133. Similarly, there was no evidence adduced by Johnson in the proceedings below that would establish that she would face *any* costs as a result of arbitration of her individual claim. The Arbitration Agreement provides that JFE would advance up to $1,500 of the arbitration costs. *See* Legal File at LF 62. There was no showing by Johnson, here, as to what the anticipated costs of arbitration would be on her claims. Thus, there is no factual basis to conclude that those costs would exceed the amount that JFE would advance, let alone be so large as to impede her ability to prosecute her claim in an arbitral forum. Certainly, there was no evidence "demonstrating that attorneys were unlikely to take claim such as Brewer's on an individual basis." *Id.* at 494. The absence of any such evidence, taken together with the simple fact that Johnson has not asserted any class claims, here, and advances only individual claims, renders the class action waiver immaterial to the determination of whether the Arbitration Agreement is "a contract that no person 'in his senses and not under delusion would make.'" *Brewer*, 364 S.W.3d at 495.

Johnson's next argument with regard to substantive unconscionability contends that "the 'Arbitration Clause' attempts to negate a right" with regard to "attorneys' fees, punitive damages, and actual damages." Respondent's Brief at 21. She, again, provides no citation to the Record on Appeal for this proposition. *See id.* This argument is flawed as it is devoid of any support in the record. Johnson does not quote any portion of the Retail Installment Contract where she claims such limitations are present, or otherwise offer any explanation for how the Retail Installment Contract would limit her ability to recover attorney fees or other remedies that might be available to her. Looking to the Arbitration Agreement, it is readily apparent that it contains no limitations on attorneys' fees, punitive damages, or actual damages. *See* Legal File at LF 62. The Agreement allows Johnson to recover her attorneys' fees if otherwise available "under applicable law." *Id.* It also requires the arbitrator to "apply governing substantive law in making an award." *Id.* This would, of course, include any statutory or common law authority that would allow for an award of actual or punitive damages that are otherwise available in traditional litigation.

Johnson recognizes that arbitration is "valid and fair if the parties [are] able to pursue and obtain the same relief that the law provided them in Court." Respondent's Brief at 22. That parity of available relief is available here. If Johnson is required to arbitrate her claims, she is entitled to raise the same claims and seek the same relief that she can seek in Court. The only difference is that the procedures of arbitration, rather than litigation, will govern how her claims will be decided. Not only are Johnson's

arguments with regard to remedial limitations outside the scope of the Arbitration Agreement beyond the issues for this Court's consideration, they are also flatly contradicted by the terms of the Arbitration Agreement itself, and provide no ground for this Court to conclude that the trial court was correct in refusing to enforce the parties' arbitration agreement.

Johnson also contends that the provision within the Arbitration Agreement that permits the parties to appeal a decision by the arbitrator to a panel of three arbitrators under certain circumstances also renders the agreement unconscionable. That provision provides that such an appeal is available[2] under any of three circumstances (1) where the arbitrator awards no recovery on a claim, (2) where an award in excess of $100,000 is awarded on a claim, or (3) where injunctive relief is granted. *See* Legal File at LF 32. Here, no injunctive relief is sought by Johnson, so the question becomes whether it is unconscionable to either permit appeals of the original arbitral award altogether or under the specific circumstances set forth within the agreement.

[2] Contrary to Johnson's arguments in her Brief, an appeal to a three-arbitrator panel is not automatic under such circumstances. Rather, the Agreement allows the aggrieved party to choose to appeal or to acquiesce to the original award. *See* Legal File at LF 32.

Johnson argues that this appeal provision provides JFE of an opportunity to get a second shot at the arbitration, despite the arbitral goal of efficient progress toward finality. She cites no authority for the proposition that such appeal provisions are unconscionable, however. Nor does her reasoning demonstrate that the provision, here, is substantively unconscionable. The provision benefits her as much as it does JFE, as it allows her to elect to appeal the arbitrator's award if the arbitrator finds in JFE's favor. JFE is only permitted to appeal the award if the amount exceeds $100,000.[3] Given that this case arises the purchase of a motor vehicle with a value of less than half that amount, it is questionable whether that monetary threshold would be met. Moreover, JFE submits that demonstrating the unconscionability of such a provision requires the presentation of *evidence* which supports such a conclusion. Given that no such evidence was adduced, this Court must reject Johnson's argument that the appeal provision renders the Arbitration Agreement unconscionable.

[3] Johnson attempts to conceive of a contorted factual scenario where JFE could seek an appeal of an arbitral award to Johnson of less than $100,000, on the basis that "the award for [JFE] was zero." However, given that JFE has asserted no claims against Johnson in this proceeding, it is unclear how the Arbitrator would be able to make a "zero" award upon such a nonexistent claim.

B. The Arbitration Agreement Does Not Prevent Johnson From Seeking Recovery Under The Missouri Merchandising Practices Act.

For the same reasons, Johnson's final argument, which asserts that the Arbitration Agreement precludes her claims under the Missouri Merchandising Practices Act ("MMPA"), also fails and must be rejected by this Court. As discussed above, the Arbitration Agreement requires the arbitrator to "apply the governing substantive law in making an award." Legal File at LF 62. This would include applying the MMPA in arbitrating Johnson's MMPA claims, including any remedies available under the MMPA if she should prevail at arbitration upon that claim.

Johnson, nevertheless, relies upon *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. App. 2005) for the proposition that enforcement of an arbitration agreement "can in effect preclude [Johnson] from the rights and remedies that she would have under the Missouri Merchandising Practices Act." Respondent's Brief at 21. *Whitney*, however, is inapposite. In *Whitney*, the arbitration agreement at issue was strikingly different than the one signed by Johnson. For example, the *Whitney* arbitration clause was in "fine print" on the reverse side of "a sheet sent to Whitney with his regular bill," as compared to the full-page, Arbitration Agreement, here, that was separately signed by Johnson. *See Whitney*, 173 S.W.3d at 310; Legal File at LF 62. In *Whitney*, the arbitration clause sought to limit incidental, consequential, and punitive damages, as well as limiting attorneys fees. *See Whitney*, 173 S.W.3d at 311. The Arbitration Agreement in this matter contains no such limitations. *See* Legal File at LF 62.

While Johnson asserts that enforcing the Arbitration Agreement would somehow deprive her of the ability to advance her MMPA claims, she fails to offer any support in the record or, indeed, any explanation of how the Arbitration Agreement would deprive her of asserting her statutory claim in arbitration. Her argument does reference discussion within *Whitney* about how the arbitration clause in that case operated to make it economically unfeasible for potential plaintiffs to bring claims (due to remedial limitations that are not present here) based upon the costs of bringing the claim in arbitration. Thus, it appears that she is attempting to assert that the Arbitration Agreement is unenforceable because the costs of arbitration exceed her potential recovery.

Johnson bore the burden in the proceedings below to show that arbitration was prohibitively expensive as well as the likelihood of incurring such costs. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000); *Pleasants v. American Express Co.*, 541 F.3d 853, 859 (8th Cir. 2008). However, she made no showing in the trial court as to what costs she anticipated incurring if she was required to submit her claims to arbitration. *See generally*, Legal File at LF 97-100. Thus, there was no basis upon which the trial court could conclude that Johnson would bear undue costs if she would be required to arbitrate her claims. Further, the Arbitration Agreement itself provides that JFE must "advance [Johnson's] filing, administration, service or case management fee and [Johnson's] arbitrator or hearing fee all up to a maximum of

$1,500." Legal File at LF 62. Because Johnson has made no demonstration that she would incur any costs associated with arbitration over and above that amount, her argument must be rejected.

Johnson's remaining arguments in the final section of her brief merely recapitulate her prior assertions that she was not provided an opportunity to change or negotiate the terms of the Arbitration Agreement. Respondent's Brief at 26. Again, these arguments, even if supported by the record, would only tend to show that the Arbitration Agreement was adhesive in nature, which does not (without more) provide a basis to invalidate the Agreement. *Manfredi*, 340 S.W.3d at 133. She asserts that she was "defrauded" into the Arbitration Agreement or induced into signing it "by duress." *See* Respondent's Brief at 28. Again, however, she offers no citation to the record to support those assertions. As with the prior instances where Johnson has failed to provide citations to the record in support of her factual assertions, this Court cannot act as an advocate for Johnson by searching the record to fill the void created by her failure to provide such citations. *See Lueker v. Missouri Western State Univ.*, 241 S.W.3d 865, 868 (Mo. App. 2008). This Court must disregard Johnson's unsupported factual assertions in this matter. In turn, given that there is no adequate factual basis to support a conclusion that the parties' Arbitration Agreement is unenforceable due to unconscionability, the trial court's denial of Appellant's Motion to Compel Arbitration must be reversed and the case remanded for entry of an order compelling arbitration of Johnson's claims.

CONCLUSION

JFE, through its opening substitute brief and the arguments set forth above, has demonstrated that the trial court erred in denying its Motion to Compel Arbitration. The Arbitration Agreement modified the Retail Installment Contract, in accordance with and in the manner expressly provided by that contract. The Arbitration Agreement is neither procedurally or substantively unconscionable. Even if the Arbitration Agreement is found to be adhesive in nature, that is insufficient grounds to find it unenforceable. Because the Arbitration Agreement was conspicuous in nature (and even signed separately by Johnson), and its terms clearly encompass the claims Johnson seeks to raise in this matter, it is not procedurally unconscionable. The Arbitration Agreement is not substantively unconscionable because it allows Johnson to bring the same substantive claims and seek the same statutory and common-law remedies that would be available to her in court. The class action waiver, here, is immaterial, given that Johnson does not seek to raise such claims and there has been no demonstration by her that such waiver (or indeed any other provision of the Agreement) would prevent her from obtaining a sufficient recovery if she prevails upon the merits or any showing by her that the costs of arbitration would make it economically unfeasible for her.

Respectfully submitted,

Case & Roberts P.C.

/s/ Patric S. Linden
Kevin D. Case, No. 41491
Patric S. Linden, No. 49551
Two Pershing Square
2300 Main Street, Suite 900
Kansas City, MO 64108
Tel: (816) 448-3707
Fax: (816) 448-3779
kevin.case@caseroberts.com
patric.linden@caseroberts.com
Attorneys for Appellants JF Enterprises and Jeremy Franklin

CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Appellants states that this Brief is in compliance with the limitations of Rule 84.06(b). The brief was prepared using Microsoft Word 2007, in Times New Roman 13 point font, and it contains 5,046 words, as determined by said software, exclusive of the cover page, signature block, and certificates of compliance and service, as determined by said software. This Brief has been scanned for viruses using Symantec Endpoint Protection Small Business Edition, and that scan indicated that the Brief was virus-free.

/s/ Patric S. Linden
Patric S. Linden

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Supreme Court Rules 84.01, 84.07, and 84.11 and Supreme Court Rule 103, Court Operating Rule 27, and Local Court Rule No. 1, that on October 8, 2012, I have electronically filed a copy of the foregoing with the Court's electronic filing system, which shall cause notice of said filing to be transmitted via electronic mail to counsel of the parties:

Joseph M. Backer
The Backer Law Firm, LLC
14801 E. 42nd Street South, Suite 100
Independence, MO 64055
Attorney for Respondent

and

Kurt D. Williams
Laura K. Brooks
Jennifer B. Wieland
Stephen M. Bledsoe
Berkowitz, Oliver, Williams, Shaw & Eisenbrandt, LLP
2600 Grand Boulevard, Suite 1200
Kansas City, MO 64108
Attorneys for Defendant American Suzuki Motor Corporation

/s/ Patric S. Linden
Patric S. Linden